

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

CIVIL NO. 12-257 (JB-LFG)

LARRY A. GOLDSTONE,
CLARENCE G. SIMMONS, III, and
JANE E. STARRETT,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL
AUTHORITY**

Defendants submit *MHC Mutual Conversion Fund, L.P. v. United Western Bancorp, Inc.*, No. 11-cv-00624, 2012 WL 6645097 (D. Colo. Dec. 19, 2012) in an attempt to convince the court that their \$400 million accounting fraud is not actionable. *MHC Mutual Conversion Fund*, however, is inapposite for several reasons. First, it was decided under the heightened pleading standards of the PSLRA that do not apply to the SEC. *See Plaintiff's Response to the Motion to Dismiss on Behalf of Defendants Larry Goldstone and Clarence G. Simmons* (Dkt 50) at 25, 28-29. Second, its findings, on an issue of first impression regarding other than temporary impairment (“OTTI”) analysis, were made under facts unique to that case and accounting standards not applicable here.¹ Other courts have cautiously avoided delving into defendants’ opinions and beliefs at the motion to dismiss stage. *See* Dkt. 50 at 41. Finally, plaintiffs’

¹ The MHC court considered OTTI analysis under accounting standards that became effective in July of 2009, and were thus inapplicable to the Defendants’ 2008 analysis conducted. *See Id.* at *8 n.5.

complaint in *MHC Mutual Conversion Fund* was found to be “void of any allegations that [defendant’s] statements regarding OTTI were subjectively false.” 2012 WL 6645097 at *11.

In contrast, the allegations here establish Thornburg’s inability to hold assets; Thornburg’s failure to timely meet margin calls gave its lenders the ability to sell those assets, negating its ability to hold. Moreover, the SEC’s complaint alleges that Defendants did not believe they had the ability to hold assets to recovery and thus did not believe those assets were only temporarily impaired. For example, the SEC alleges that “Defendants knew, or were reckless in not knowing, that Thornburg did not have the intent or ability to hold its ARM Securities until maturity or until their value recovered in the market” and therefore, based on clear accounting guidance from Starrett, “the company was required to recognize more than \$400 million in losses associated with its ARM Securities on its income statement.” (Compl. ¶ 12). Thus, the SEC’s complaint alleges that Defendants’ OTTI analysis was both objectively and subjectively false.

DATED this 17th day of January, 2013

s/ Stephen C. McKenna
Stephen C. McKenna
Gregory A. Kasper
Dugan Bliss
Attorneys for Plaintiff
Securities and Exchange Commission
1801 California Street, Suite 1500
Denver, CO 80202
Ph. (303) 844-1000
email:
mckennas@sec.gov
kasperg@sec.gov
blissd@sec.gov

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2013, the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system that will send notification of such filing to all counsel of record.

Michael Hoses

Assistant United States Attorney

P.O. Box 607

Albuquerque, NM 87103

(505) 346-7274

E-mail: Michael.hoses@usdoj.gov

Local Counsel for Plaintiff Securities and Exchange Commission

Alanna G. Buchanan (alanna.buchanan@wilmerhale.com)

Joel Fleming (joel.fleming@wilmerhale.com)

Chris Johnstone (chris.johnstone@wilmerhale.com)

Wilmer Cutler Pickering Hale and Dorr LLP

950 Page Mill Road

Palo Alto, CA 94304

Phone: (650) 858-6000

Fax: 650-858-6100

Randall R. Lee (Randall.lee@wilmerhale.com)

Jessica F. Kurzban (Jessica.kurzban@wilmerhale.com)

Peiyin Patty Li (Patty.li@wilmerhale.com)

Wilmer Cutler Pickering Hale and Dorr LLP

350 S. Grand Avenue, Suite 2100

Los Angeles, CA 90071

Phone: (213) 443-5360

John A. Valentine (john.valentine@wilmerhale.com)

Lauren R. Yates (lauren.yates@wilmerhale.com)

Michael A. Lamson (Michael.lamson@wilmerhale.com)

April N. Williams (April.Williams@wilmerhale.com)

Wilmer Cutler Pickering Hale and Dorr LLP

1875 Pennsylvania Ave., NW

Washington, DC 20006

Phone: (202) 663-6000

Fax: (202) 663-6363

Attorneys for Defendant Larry Goldstone and Clarence Simmons, III

Andrew G. Schultz (aschultz@rodey.com)

Bruce D. Hall (bhall@rodey.com)

Melanie B. Stambaugh

Rodey, Dickason, Sloan, Akin & Robb, P.A.

201 3rd Street NW, Suite 2200

P.O. Box 1888

Albuquerque, NM 87102

Attorneys for Defendants Larry Goldstone, Jane E. Starrett and Clarence Simmons, III

Jerry L. Marks (jmarks@milbank.com)

Alisa Schlesinger (aschlesinger@milbank.com)

Elena Kilberg (ekilberg@milbank.com)

Robert J. Liubicic (rliubicic@milbank.com)

Paul M. Torres

Milbank, Tweed, Hadley & McCloy LLP

601 S. Figueroa Street, 30th Floor

Los Angeles, CA 90017

Phone (213) 892-4000

Fax: (213) 892-5063

Thomas Arena (tarena@milbank.com)

Milbank, Tweed, Hadley & McCloy LLP

1 Chase Manhattan Plaza

New York, NY 10005

Phone: (212) 530-5000

Fax: (212) 530-5219

Attorneys for Defendant Jane Starrett

s/ Marla J. Pinkston

Marla J. Pinkston